

department, branch, or associated company in which he is engaged, as shown by the profit and loss accounts forwarded to Harrison & Crosfield Limited in London, adjusted in accordance with rule 7. Such percentage shall be either a flat rate or a rate based on a datum line of profits, in which latter case additional remuneration in respect of profits in excess of such datum line shall be paid at a higher rate or lower than in respect of those up to that line. Provided that the additional remuneration payable shall in the case of every recipient be limited to such an amount as the appropriate Revenue authorities shall allow as a deduction from such profits for the purpose of any taxation levied in respect of such profits in any part of the world.

...

5.(c) Although the additional remuneration provided for under this scheme is equal to a percentage of the profits of the department, branch, or associated company concerned, the amount shall be paid to each individual as remuneration for services rendered by him outside the United Kingdom, and his fixed salary and additional remuneration under this scheme shall together form his total remuneration for the company's year in which the amounts are paid."

The following characteristics of the A.R. are revealed from the letter of appointment and the rules:

- (1) The senior executives are entitled to participate in the profits of the company under the A.R. scheme.
- (2) The basis of participation is, however, subject to review by the company annually.
- (3) The A.R. is separate and distinct from the "fixed salary" of the senior executives.
- (4) The fixed salary and A.R. constitute the total remuneration.
- (5) The company reserved the right to review individual rates.

In *Re Eddystone Marine Insurance Co.*⁽⁵⁾ (not a tax case) Stirling J. adopted the definition of "bonus" given in the *New English Dictionary*, viz. "a boon or gift over and above what is normally due as remuneration". In *Great Western Garment Co. v. Minister of National Revenue*⁽⁶⁾, to ascertain whether payment was a bonus O'Connor J. applied the test whether it is something in addition to or in excess of what is ordinarily received. He then held that in the context of that case where a company passed a resolution providing for certain officials' salaries to be free of income tax, the "free of income tax" is not something in addition to or in excess of what is to be received but part and parcel of a salary.

A Therefore although the market value of each senior executive of the respondent company would comprise his basic salary and in addition his A.R., the character of the A.R. makes it separate and distinct from the fixed salary and therefore cannot be regarded as a deferred salary. Secondly, although the additional remuneration scheme is a permanent scheme and under the rules the payment of A.R. itself is in that sense permanent, the A.R. was payable contingent upon the respondent company making a profit. Finally, the rate of A.R. is reviewable by the employer which the employer is not permitted to do with respect to the salary.

B The senior executives were paid A.R. and the junior executives and the non-managerial staff were paid bonus based on profitability. The A.R. therefore is nothing more than a bonus and should be regarded in law as a bonus by a different name. C The senior executives are not entitled to the A.R. and the junior executives and the non-managerial staff are not entitled to bonus if the company does not make a profit.

The question posed is therefore a narrow one — whether A.R. is a bonus in character although it is called A.R. and not bonus. Our answer is that it is bonus and caught by section 39(1)(h) of the Income Tax Act.

The appeal is accordingly allowed with costs.

F

Appeal allowed.

Solicitors: *Shook Lin & Bok.*

G MINISTER OF RESOURCE PLANNING & ORS. v. KERUNTUM SDN. BHD.

[S.C. (Salleh Abas L.P., Seah & Hashim Yeop A. Sani S.C. JJ.) 10 February and 23 March 1988]

[Kuching — Supreme Court Civil Appeal No. 407 of 1987]

H *Administrative Law — Certiorari — Prohibition — Forest timber licence — Cancellation — Alleged breach of conditions of licence — Licence not automatically invalid — Opportunity not given to licensee to explain invalidating event — Forest Ordinance (Sarawak) (Cap. 126), ss. 2, 49, 51 & 55.*

I *Forestry — Issue of licences — Licences declared non-transferable by Ordinance — Whether licence automatically invalid for breach of condition of non-transferability — Discretion of Director — Opportunity to be given to licensee to explain invalidating event — Forest Ordinance (Sarawak) (Cap. 126), ss. 2, 49, 51 & 55.*

In this case, the Director of Forests had, with the approval of the Minister, issued a forest timber licence to

the respondent for 25 years. The licence purported to be issued under section 55 of the Forest Ordinance (Sarawak) (Cap. 126). It was declared to be non-transferable and had a condition that the Director of Forests may with the approval of the Minister terminate the licence by giving three months' notice in writing if the respondent failed to comply with any of the provisions and conditions of the licence. The Director of Forests in this case gave the respondent a letter informing him that the licence was thereby revoked. No reason was given for the revocation. The respondent obtained leave to commence proceedings for orders of certiorari and prohibition to quash the revocation and to prohibit the Director, the Minister and the Government of Sarawak (the appellants) from acting in the purported revocation. It was after such leave was granted that the Director informed the respondent that the licence had not been revoked but had become automatically invalid by operation of law by the respondent's own acts and the acts of its shareholders which acts were done without the permission of the Director.

One of these acts was that the controlling shares in the respondent were transferred since the date of the issue of the licence. Abu Mansor J. in the High Court held that the respondent was entitled to the order for certiorari because under the licence it was entitled to three months' notice before the licence could be terminated. The appellants appealed.

Held, dismissing the appeal: (1) the licence in this case was intended by the Director to be issued under section 55 of the Forest Ordinance;

(2) the expression "declared to be non-transferable" in section 2(2) of the Forest Ordinance does not restrict the operation of the section to licences issued under section 51 only; it extends to licences issued under section 55 also. Section 2(2) of the Ordinance applies to licences issued under section 55 in the same way as it does to licences issued under section 51;

(3) the licence did not become automatically extinguished or invalid the moment the transfer of the controlling shares or other paragraphs of subsection (2) of section 2 of the Ordinance took place. The phrase "unless the Director or a person authorized by him in that behalf otherwise directs" is clearly intended by the legislature to mean that a licence does not become automatically invalid;

(4) the proper procedure which should be accepted by the Director is that as soon as he becomes aware of the happening of any of the events enumerated in paragraphs (a), (b), (c) and (d) of section 2(2) of the Ordinance, he has to make up his mind whether to treat the licence as invalid or to treat it as still continuing. But before making any such decision one way or the other the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled;

(5) there is therefore no question of the licence becoming automatically invalid and, as the respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle him to a contrary decision of the Director, the appeal is dismissed with costs.

A Case referred to:

- (1) *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee* [1983] 2 M.L.J. 35 (dicta *apprvd*).

B *Michael J. Beloff Q.C. (Datuk C.T. Wong, J.C. Fong and Lim Heng Choo with him)* for the appellants.

G. Sri Ram (Goh Choo Kee and Colin Lau with him) for the respondent.

Cur. Adv. Vult.

C **Salleh Abas L.P.** (delivering the judgment of the court): On 10 October 1983, the Director of Forests, Sarawak, with the approval of the Minister, issued to the respondent (Keruntum Sdn. Bhd.) a forest timber licence No. T/0279, for 25 years, covering 188,926 hectares of timber land in Long Akah area. The licence was issued pursuant to an application made by one Haji Mohamed Louis Ali in a letter dated 27 December 1982, addressed to the Minister of Forestry (now the Minister of Resource Planning), being the Minister then responsible for forest matters.

E The licence has several clauses — 32 in all. Under clause 31, the licence is declared to be non-transferable and under clause 24 the Director of Forests may with the approval of the Minister terminate the licence by giving three months' notice in writing if the respondent fails to comply with any of the provisions and conditions of the licence.

G On 11 March 1987, the Director in a very brief letter informed the respondent that the licence was thereby revoked. No reason was given for the revocation. Subsequently, on 8 April 1987, pursuant to an *ex parte* application, the respondent obtained leave from the High Court at Kuching to commence proceedings for orders of certiorari and prohibition to quash the revocation and to prohibit the Director, the Minister and the Government of Sarawak (the appellants) from acting upon the purported revocation. The respondent also obtained an order for a stay of any further action to be taken by the appellants based upon the said revocation.

H It was not until after such leave was granted, **I** however, that the Director by a letter dated 15 May 1987 informed the respondent that the licence was not revoked but became automatically invalid by operation of law as a result of the respondent's own act and the acts of its own shareholders which acts were done without permission of the Director. One of these acts is that the con-

trolling shares in the respondent were transferred since the date of the issue of licence.

The motion for certiorari and prohibition was heard by Datuk Abu Mansor J. on 4 and 20 June 1987, and on 10 August, in a very careful written judgment, the learned judge allowed the motion. He held that the respondent was entitled to the order of certiorari because under clause 24 of the licence it was entitled to three months' notice before the licence could be terminated.

In this appeal, Mr. Beloff (counsel for the appellants) submitted to us that the appeal should be decided on the basis of section 2(2) of the Forest Ordinance, which for the sake of convenience is set out as follows:

"(2) Where a licence or permit is, under this Ordinance, declared not to be transferable, the licence or permit shall, unless the Director or a person authorized by him in that behalf otherwise directs, be invalid if —

- (a) ...
- (b) in the case of a licence or permit issued to a company, the controlling shares in the company are transferred;
- (c) ...
- (d) the holder thereof enters into an agreement with any other person, the effect of which is to enable the benefits conferred by the licence or permit to be enjoyed by any other person."

It is the crux of his submission that as soon as any of the events stated in paragraphs (a) to (d) happened, the respondent's licence became automatically invalid unless the respondent can show that the Director or any person authorized by him has given any contrary direction. In this case the relevant event is the paragraph (b) event in that the controlling shares in the respondent were transferred on 14 December 1983.

Mr. Sri Ram, counsel for the respondent, conceded that there had been such transfer but disagreed as to the application and construction of section 2(2). He submitted that because of the phrase "declared not to be transferable", section 2(2) only applies to cases where a licence is declared non-transferable by the Ordinance. Thus, where a licence like the present one is made non-transferable by the licence itself, *i.e.* clause 31, section 2(2) does not apply.

What then is a licence declared non-transferable by the Ordinance?

A There are three sections which authorize the issue of licences, namely, section 49, section 51 and section 55. Of these three sections, only section 51 contains a provision, *i.e.* (sub-section (4)) that the licences "shall not be transferable". Thus according to Mr. Sri Ram's submission, only a licence issued under section 51 is the one "declared not to be transferable" for the purpose of application of section 2(2). Unlike section 51, however, section 55 has no similar provision. The non-transferability of the licence thereunder is achieved by the inclusion of a clause in the licence itself (clause 31). Therefore, Mr. Sri Ram submitted, a licence issued under section 55 is not a licence "declared not to be transferable" and as such cannot be brought under the regime of section 2(2).

D The crux of this submission really lies at a distinction between a licence issued under section 51 and a licence issued under section 55. On this point, the learned judge made a ruling, which is strongly supported by Mr. Beloff, to the effect that the licence in this case was issued under section 51 as enlarged or amplified by section 55. E The learned judge said: "Since I take the view that a section 55 licence is in substance an extension of a section 51 licence and declared by section 51(4) to be non-transferable it therefore comes for interpretation under section 2(2) of the Ordinance." Mr. Sri Ram disputed the correctness of this ruling and lodged a cross-appeal on it contending that the learned judge should have held that the licence was issued under section 55 and that section 55 is an independent source of power and not a mere extension of section 51. Finally, Mr. Sri Ram submitted that even if section 2(2) is applicable, there must be a right of representation to be given to the respondent, which, in this case, none at all was given.

The first question to be determined here is therefore whether or not this licence, *i.e.* Licence No. T/0279, was issued under section 51 or under section 55? As already stated earlier, there are three separate provisions in the Ordinance which deal with the issue of forest licences. These are sections 49, 51 and 55. For the sake of easy references the three sections are therefore set out below:

I "49. Subject to the provisions of sections 23, 37 and 65, the taking of forest produce in forest reserves and protected forests shall be controlled and regulated by the Director who may:

- (a) issue such licences or permits in such form and under such conditions as he may deem expedient;

- (b) call for tenders for the right to take forest produce from a specified area;
- (c) fix the fees, royalties, premia or other payments to be made in respect of such forest produce in any particular case; and
- (d) permit any other words that he may deem necessary for the taking of such forest produce or for the management of the forest;

Provided that no licence or permit issued under this section may be valid for a period exceeding one year after the date of issue or renewal thereof, except with the express permission of the Minister."

"51.(1) Licences and permits for the taking of forest produce on state land other than forest reserves or protected forests may be issued by the Director or any forests or other government officer generally or specially authorized by him.

(2) Such licences and permits may not be issued for a period exceeding one year, except with the express permission of the Minister and under such conditions as he may approve, and shall be applicable only to the areas and kinds of produce named therein.

(3) Immediately upon the expiration of a licence or permit, it shall be returned to the officer who issued it.

(4) Licences and permits shall not be transferable.

(5) Licences and permits may be refused at the discretion of the officer concerned:

Provided that an appeal may be made to the Director, whose decision shall be final."

"55. Nothing contained in section 51 or 52 shall be deemed to prohibit the Director, with the approval of the Minister, from issuing licences under special conditions, and for periods exceeding one year, in cases where he may deem such licences expedient."

Having regard to the learned judge's ruling and the submission of counsel for both sides, the issue really turns upon the question whether section 55 is a part or an extension of section 51 as held by the learned judge or whether section 55 is an independent section altogether from section 51 as maintained by Mr. Sri Ram.

To answer this question, the important thing to observe is that section 55 speaks of "licences under special conditions". Although the two sections appear to be relatively similar, upon close scrutiny there can be no doubt that the licences of which section 55 speaks are of a different kind, being much bigger and more extensive in effect. To appreciate the true meaning of this section, one must therefore look at it from the point of view of types or categories of licences rather than from the

A point of view of the powers of the Director of Forests to issue licences under the Ordinance.

B There are three types of licences to take forest produce in Sarawak. The first type is a licence to take forest produce in forest reserves or protected forests. The second type is a licence to take forest produce on state land not being forest reserves or protected forests. And the third type is a licence with special conditions to take forest produce irrespective of whether the licence is in respect of forest reserves and protected forests or not. The first type is governed by section 49, the second by section 51, whilst the third by section 55. But whatever type a licence may belong to, all licences require ministerial approval if they are to exceed one year in duration.

D Having said this, we have now to consider how to determine whether a licence is one "under a special condition" issued pursuant to section 55 when the expression "special conditions" are not defined by the Ordinance, bearing in mind a similarity that a licence issued under section 51 may also be subject to "such conditions as the Minister may approve". Is there any difference in the meaning between the expression "special conditions" in section 55 and the expression "such conditions as the Minister may approve" in section 51? From the practice of the Forest Department, there appears to be such a distinction. According to the forms contained in the Forest Rules, licences issued under section 49 and section 51 appear to be very simple licences without much elaboration (see Form III and Form IV). There is, however, no form prescribed for licences issued under section 55. In this case, the licence, *i.e.* Licence No. T/0279, is entirely different from those issued under sections 49 and 51. It contains no less than 32 clauses altogether and the licence itself recites that it was issued under section 55. The licence begins with the following words:

H "The Director of Forests in exercise of the powers conferred on him by sections 49, 51 and 55 of the Forest Ordinance and with the approval of the Minister ..."

I There is, however, a deletion of the letter "s" attached to the word "sections", and the figures "49 and 51". Thus what remains is.

"The Director of Forests in exercise of the powers conferred on him by *section 55* of the Forest Ordinance and with the approval of the Minister..."

(italics added)

During the course of this appeal, we were shown the original licence in possession of the respondent and the office copy in possession of the Director of Forests. The deletion was made on both copies by drawing a straight line in red from the letter "s" through figure "49" and figure "51". Thus it is clear that the licence was intended by the Director to be one issued under section 55.

The next point to consider is the non-transferability of the licence. We may recall that section 51 has a sub-section (4) which enacts that licences shall not be transferable. There is, however, no equivalent sub-section or provision in section 55. Thus it is clear that all licences issued under section 51 must per se be non-transferable, whether the licence contains this provision or not, since it is already the command of the statute that it should be non-transferable. There is no way in which such licences could be made transferable without amending the legislation. On the other hand, the absence of an equivalent provision in section 55 indicates that licences under special conditions need not necessarily be non-transferable. This section does not require that it must be non-transferable. Whether it is so or not is a matter of policy decision on the part of the Minister and the Director of Forests. In this particular case, the non-transferability was achieved by the inclusion of clause 31 in the licence itself.

Mr. Beloff maintained that this clause is merely a declaratory provision of sub-section (4) of section 51. He would be right of course if we agree with him that licences issued under section 55 are in fact licences issued under section 51. However, we do not agree with his submission. In our view, the licence was non-transferable because of the licence itself and not by virtue of the Ordinance.

The next question to consider is whether this licence, *i.e.* licence No. T/0279, is such a licence that comes under the expression "declared not to be transferable" within the meaning of section 2(2). If so, section 2(2) is applicable and if not the licence is beyond the reach of section 2(2).

Mr. Sri Ram submitted that since the licence is made non-transferable not by the Ordinance but only by the licence itself, it therefore does not come within the meaning of the expression "declared not to be transferable".

In our view, this argument tends to be hair-splitting. Whatever the position may be, it is undeniable that a licence issued under section 55 is a

A licence issued under the authority of this Ordinance, irrespective of whether the non-transferability was achieved by the licence itself or as a result of a statutory provision. What is done by the licence must of necessity be regarded as done under the authority of the Ordinance. There is nothing in section 2(2) which justifies a conclusion that the section only applies to a licence issued under section 51. The expression "declared not to be transferable" in section 2(2), for reasons we have given above, does not restrict the operation of the section to licences issued under section 51 only. It extends to licences issued under section 55 also. Thus we hold that section 2(2) applies to licences issued under section 55 in the same way it does to licences issued under section 51.

This brings us to the crucial issue of this appeal, namely, what is the effect of section 2(2) on the licence when any of the events mentioned in paragraphs (a), (b), (c) and (d) happens?

Mr. Beloff submitted to us strongly that the licence becomes automatically invalid when, as in this case, paragraph (b) was in fact violated in that the controlling shares in the respondent company were transferred. When pressed for any authority on the doctrine of automatic invalidity, he was unable to show us any. However, according to his submission, automatic invalidity could be prevented if there is a contrary direction given by the Director or any person authorized by him and it is not for the appellants to show the existence of such contrary direction. In his view, this burden of showing that there was a contrary direction must be on the respondent.

For the sake of clarity, we wish to reproduce the relevant part of the section, which is as follows:

"Where a licence ... is under this Ordinance declared not to be transferable, the licence ... unless the Director or a person authorized by him in that behalf otherwise directs, be invalid if (a), (b), (c) and (d) ..."

We accept his submission that the burden of proving the existence of a contrary direction is on the respondent, but how could the respondent do it if the Director had not given the respondent an opportunity to discharge that burden? In this case, there has not been any such opportunity given. All that happened was that the Director of Forests wrote a very curt letter on 11 March 1987, stating that the licence was revoked. He gave no reasons for the revocation. It was only as a result of the

respondent commencing proceedings for certiorari and prohibition in the High Court that the Director wrote a second letter on 15 May 1987 explaining the meaning of revocation and requesting the respondent to reconsider its judicial proceedings in the light of the explanation given. We, therefore, cannot accept Mr. Beloff's submission that the licence became automatically extinguished or invalid the moment the transfer of controlling shares, or other events mentioned in other paragraphs of the sub-section, took place. The phrase "unless the Director or a person authorized by him in that behalf otherwise directs" is clearly intended by the legislature to mean that a licence does not become automatically invalid. This phrase indicates that the Director has a choice. The proper procedure which should be adopted by him seems to us to be this: as soon as he becomes aware of the happening of any of the events enumerated in paragraphs (a), (b), (c) and (d), he has to make up his mind whether to treat the licence as invalid or to treat it as still continuing. But before making any such decision one way or the other, the principle of fairness and prudent administration requires him to inform the licensee that his licence would be cancelled unless he can show an acceptable reason why it should not be regarded as invalid and therefore cancelled. This principle is in line with the *dicta* of the Federal Court in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang v. Ong Gaik Kee*⁽¹⁾ at p. 37, which is as follows:

"Every exercise of statutory power must not only be in conformity with the express words of the statute but above all must also comply with certain implied legal requirements. The court has always viewed its exercise as an abuse and therefore treats it as illegal where the exercise is done for an inadmissible purpose or on irrelevant grounds or without regard to relevant considerations or with gross unreasonableness (de Smith's, 4th Ed., p. 323 and *Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation* ([1948] 1 K.B. 223))."

Further, under sub-section (7) of section 51, it is an offence punishable with the penalty of two thousand dollars if a licensee transfers or assigns his licence "against the provision of this Ordinance". Because of the expression "against the provision of this Ordinance", this sub-section has the effect of excluding licences issued under section 55 from being the subject-matter of the offence under sub-section (7) since the non-transferability of the licence issued under that section, *i.e.* section 55, is not by "the provision of this Ordinance" but by the provision of the licence itself. Thus, if any licensee transfers or assigns his licence (being a licence issued to him under section 55) though such licence is stated not to be transferable,

A such transfer will not be an offence within the meaning of sub-section (7) of section 51.

In cases where an offence is committed, the Director has the power to terminate the licence in accordance with section 93, which is as follows:

B "93. Upon conviction of the holder of a licence or permit issued under this Ordinance of a forest offence:

(a) the court may of its own motion cancel or suspend, for such period as it may think fit, such licence or permit; and

C (b) the Director may, unless the court has either made an order under paragraph (a) or directed that the Director shall not exercise the power hereby given, terminate such licence or permit by two months' notice in writing to the holder thereof."

D The Malaysian jurisprudence observed by the courts throughout Malaysia is that any forfeiture of the licence following a conviction has always been ordered by the court not as a matter of course but as a result of a judicial enquiry. The court may or may not exercise the power to order the forfeiture but in any case before an order of forfeiture is made an enquiry must always be held. Thus since no automatic forfeiture is accepted in the case of a conviction of a penal offence, it would be strange to invoke the notion of automatic invalidity in respect of a breach of a term of the licence which is essentially a contract and does not amount to a penal offence. Therefore, the provision of sub-section (7) of section 51, and section 93, whether read together or singly, do not support the contention that a licence becomes automatically invalid upon the happening of any of the events mentioned in section 2(2). On the other hand, these two sections, especially paragraph (b) of section 93, reinforce our conviction that there is no automatic invalidity.

H There are two other matters raised by Mr. Beloff. First, if we cannot accept his submission on automatic invalidity we should nevertheless allow the appeal because paragraph 5 of the affidavits sworn on 24 March 1987 on behalf of the respondent contains a false statement to the effect that the respondent had "at all material times complied with all the terms and conditions of the said licence". Our answer to this submission is that the question of falsity of the statement is not beyond argument and since this is the first time that the matter was raised, it is now too late for us to do anything about it. It should have been raised in the court below.

The second matter raised by Mr. Beloff is that we should make a ruling that the leave granted by the High Court to commence certiorari and prohibition proceedings in respect of other revoked licences should not have the effect of staying any action which the appellants might wish to take upon those licences. Again, our response to this submission is that this is not a matter which concerns this particular appeal. We do not feel any necessity of making any ruling beyond what is required in the present appeal.

In conclusion, we hold that there is no question of the licence becoming automatically invalid and that as the respondent was deprived of an opportunity to explain the invalidating event and to discharge the burden which would entitle it to a contrary decision of the Director, the appeal is therefore dismissed with costs. We also order that the deposit should be paid to the respondent on account of taxed costs.

As regards the cross-appeal by the respondent, we do not think that we should make any order as to costs since the issue raised in it is inextricably part and parcel of the main appeal.

Appeal dismissed.

Solicitors: Reddi & Co.; Abdul Rahman, Chan, Jugah, Wan Ullok & Co.

HUSSIN BIN SILLIT v. PUBLIC PROSECUTOR

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Mohamed Azmi S.C.JJ.) 12 February & 23 April 1988]

[Kuala Lumpur — Supreme Court Criminal Reference No. 4 of 1987]

Criminal Procedure — Alibi defence — Notice of defence — Reference to Supreme Court — Whether cautioned statement constitutes valid notice — Amendment of charge relating to time in charge — Whether notice of alibi defence need not be served to render evidence of alibi admissible — Courts of Judicature Act 1964, s. 66(1) — Criminal Procedure Code (FMS Cap. 6), ss. 113, 156 & 402A.

In this case, the accused was charged with rape. The accused sought at the trial to rely on the defence of alibi. No notice under section 402A of the Criminal Procedure Code had been given to the Public Prosecutor. However, the accused had made a cautioned statement to the police which was alleged to contain the defence of alibi. At the trial in the Sessions Court, the charge was amended by altering the time in the charge from "8:30 p.m." to "8.00 p.m."

A It was argued that because of this amendment in the charge the provisions of section 402A of the Criminal Procedure Code were no longer applicable. A the trial, the accused was convicted and sentenced to three years' imprisonment. The learned President rejected the accused's evidence of alibi. His appeal to the High Court was dismissed. The accused was given leave to refer two questions of law of public interest to the Supreme Court. The two questions as reframed were:

B (a) whether a cautioned statement recorded under section 113 of the Criminal Procedure Code can constitute a valid notice under section 402A of the Criminal Procedure Code; if the answer is in the negative, then (b) whether in an offence where the charge is amended in the course of the trial relating to the time set out in the original charge, section 402A of the Criminal Procedure Code is not applicable, and notice required to be served thereunder need not be so served to render evidence in support of a defence of alibi admissible.

C **Held**, answering both questions in the negative: (1) for the purpose of compliance with section 402A of the Criminal Procedure Code, actual written notice containing particulars of the alibi must be given to the Public Prosecutor within the prescribed period. Therefore, a cautioned statement recorded by the police under section 113 of the Criminal Procedure Code does not constitute a valid notice under section 402A of the Code. The answer to the first question is in the negative;

D (2) the alteration in the charge as to time by half an hour could not possibly on the facts of the case alter the legal position as to the requirement of alibi notice. Both the original and amended charges refer to one and the same occasion and accordingly any argument on the basis of the whereabouts of the accused on "another occasion" which evidence is not "evidence in support of a defence of alibi" does not arise at all;

E (3) the accused also failed to satisfy the court that by reason of any error or omission in the particulars given in the original charge, the time, place and date of the alleged offence were so uncertain that he was in fact misled in not supplying the particulars of alibi required to be given to the Public Prosecutor within the prescribed period, so as to justify the trial court to conclude that the disputed evidence which he intends to adduce at the trial is, having regard to the circumstances of the case, not "evidence in support of a defence of alibi" and thereby should remain outside the restriction of section 402A of the Code;

F (4) having regard to the facts and circumstances of this case, in particular the nature of the offence, the particulars given in the charge, the materiality of the amendment and the type of alibi evidence intended to be adduced, the second question posed should also be answered in the negative.

Cases referred to:

- I (1) *Rangapula & Anor. v. Public Prosecutor* [1982] 1 M.L.J. 91 (expld).
- (2) *Public Prosecutor v. Lim Chen Len* [1981] 2 M.L.J. 41 (apprvd).
- (3) *Ku Lip See v. Public Prosecutor* [1982] 1 M.L.J. 194 (folld).
- (4) *R. v. Lewis* [1969] 2 Q.B. 1 (distd).
- (5) *R. v. Hassan* [1970] 1 Q.B. 423 (distd).